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No. 91-2050

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C.,

Petitioners,

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, a Professional Corporation; M.J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH CHAPPELL, ALLDAY & ALSUP; and SMALL, CRAIG & WERKENTHIN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF RESPONDENTS THOMAS T. ROGERS AND SMALL, CRAIG & WERKENTHIN

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July 17, 1992

QUESTIONS FOR REVIEW

I. WHETHER THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT AND BANKRUPTCY COURTS' RULINGS THAT PETITIONERS WERE COLLATERALLY ESTOPPED FROM RELITIGATING THE APPLICABILITY OF 11 U.S.C. § 108(a).

II. IF PETITIONERS WERE NOT COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE, WHETHER THEIR CHALLENGE TO THE JUDGMENTS WOULD BE WITHOUT MERIT BECAUSE THE TOLLING PROVISION OF 11 U.S.C. § 108(a) WAS NOT AVAILABLE TO BESING AT THE TIME HIS STATE COURT SUIT WAS FILED SINCE HE WAS NO LONGER A DEBTOR-IN-POSSESSION AND HIS CONFIRMED PLAN OF REORGANIZATION DID NOT RETAIN THE CAUSF OF ACTION WITHIN THE BANKRUPTCY ESTATE.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

PETITIONERS

Ray G. Besing
Ray G. Besing & Associates, P.C.

RESPONDENTS

Thomas T. Rogers
Small, Craig & Werkenthin
Lynch, Chappell & Alsup, formerly Lynch, Chappell, Allday & Alsup
Seeligson & Steinberg, formerly Seeligson, Douglass, Falconer & Vanden Eykel, P.C.
M.J. "Ike" Vanden Eykel

COUNSEL FOR PETITIONERS

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COUNSEL FOR RESPONDENTS

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Patricia A. Nolan
For Thomas T. Rogers and Small, Craig & Werkenthin

Brill, Sinex, Hohmann & Stephenson
Joe A. Byrom
Robert Clark
For Seeligson, Douglass, Falconer & Vanden Eykel, P.C. and M.J. "Ike" Vanden Eykel

Cowles & Thompson
Dwayne J. Hermes
Charley Frazier
For Lynch, Chappell, Allday & Alsup

OTHER INTERESTED PARTIES

Jack A. Moffitt, Jr., former counsel for Petitioners
Koons, Fuller, McCurley & Vanden Eykel, the firm with which M.J. "Ike" Vanden Eykel is now associated
Tom C. McCall
Henry Seeligson
John P. Falconer, Jr.
Paul T. Nipper, Jr.
Jimmy L. Verner, Jr.
Frank B. Lyon
C. Barry Osborne
J. Matthew Dow

None of the above-individuals are parties to this lawsuit; they are affiliated with the defendant law firms. Each has been named as an individual defendant in a new lawsuit brought by Petitioners involving the identical facts and allegations.

Schuyler B. Marshall

Counsel of Record
for Respondents

Thomas T. Rogers and
Small, Craig & Werkenthin

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ABBREVIATIONS

In this Brief, the following terms in quotation marks shall have the meaning as referenced:

"Rogers" refers to Thomas T. Rogers and Small, Craig & Werkenthin collectively, who were Defendants below.

"Besing" or "Petitioners" refers to Ray G. Besing and Ray G. Besing & Associates, P.C. collectively, who were Plaintiffs below.

The "Plan" refers to Besing's Amended Joint Plan of Reorganization confirmed June 28, 1989.

For ease of reference, the Bankruptcy Code will be referred to herein by section number and/or referred to as "the Code".

No. 91-2050

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C.,

Petitioners,

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, a Professional Corporation; M.J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH CHAPPELL, ALLDAY & ALSUP; and SMALL, CRAIG & WERKENTHIN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF RESPONDENTS THOMAS T. ROGERS AND SMALL, CRAIG & WERKENTHIN

STATEMENT OF THE CASE

This case does not present any issue which merits the attention of this Honorable Court. Petitioners do not

appeal from a decision which conflicts with any decision from another United States court of appeals or any decision on a federal question that conflicts with a Texas Supreme Court decision. Petitioners present no evidence that the lower courts departed from the accepted and usual course of judicial proceedings, and then do not present a federal question of first impression, either. This appeal concerns only the collateral estoppel effect of a summary judgment. Pursuant to Rule 10, Rules of the Supreme Court, the Petition therefore should be denied.

Course of Proceedings Below

The course of proceedings below is adequately presented in Petitioners' Brief, except that (1) this appeal would not require a determination of the correct construction or application of § 11 U.S.C. § 108(a) because Petitioners are collaterally estopped from raising these issues; and (2) the Bankruptcy Court did not decline to hear this case; it granted a summary judgment on grounds that Petitioners were estopped from relitigating their claim.

Statement of Facts

Rogers strenuously denies Petitioners' assertion that Rogers' conduct caused the striking of their pleadings or the granting of a default judgment and summary judgment as to the counterclaims in the Noble litigation.

The Court should consider the following facts in addition to the facts presented in Petitioners' Brief:

1. The Petitioners and the Respondents in this cause of action are identical parties to those in Besing's collateral state-court action, Case No. 90-7968-C, Texas District Court, Dallas County, 68th Judicial District. Indeed the District Court noted that the Petitions did "not challenge that the elements for collateral estoppel are met." (Section "C" of Petitioners' Appendix).

2. Besing's state-court action against Rogers has been dismissed with prejudice and is final, pending Besing's right to appeal.

3. Petitioners have admitted in the state-court action that Respondents' statute of limitations defense turned on whether 11 U.S.C. § 108, which operates to extend the period of limitations, was available to Plaintiffs as debtors in possession on September 19, 1989.

4. The state court found that neither Besing's Joint Plan of Reorganization nor the confirmation order reserved the malpractice action against Respondents in the bankruptcy estate.

SUMMARY OF THE ARGUMENT

Besing first filed suit in state court against Rogers and others, and summary judgments were granted on the basis of limitations. Besing appealed, and a Texas

court of appeals affirmed the summary judgments. Besing then appealed to the Texas Supreme Court, and that appeal is pending. While his state court action was pending, Besing filed suit in the Bankruptcy Court, seeking a redetermination of the same limitations issue against the identical defendants. The Bankruptcy Court granted Rogers and the other defendants summary judgment on the grounds of collateral estoppel (Section "D" of Petitioners' Appendix), and the District Court affirmed. (Section "C" of Petitioners' Appendix). On February 21, 1992, the United States Court of Appeals for the Fifth Circuit affirmed the bankruptcy and district courts' rulings, holding "that the prior state court judgment collaterally estopped Besing from relitigating the applicability of section 108(a)." (Section "A" of Petitioners' Appendix).

The state-court judgments against Besing are final for collateral estoppel purposes, even though an appeal is pending, because the appeal is not a trial de novo. An appeal of a summary judgment is not a trial de novo because the appellate court is limited to the record before it and does not "try the case as if the suit had been filed originally in that court." Accordingly, the Bankruptcy Court properly granted summary judgment based upon collateral estoppel, and the District Court and the Fifth Circuit properly affirmed.

Even if collateral estoppel did not apply, Besing would not be entitled to the benefit of 11 U.S.C. § 108 because its

tolling provision applies only to claims brought by trustees and debtors-in-possession. A mere debtor is not entitled to the benefit of Section 108 on a claim that reverts to the debtor upon confirmation of the debtor's plan of reorganization. The claims against Rogers and his codefendants were not explicitly reserved for the estate in Besing's Plan. Therefore, pursuant to 11 U.S.C. § 1141(b), such claims vested in Besing upon confirmation. Accordingly, Section 108 does not apply and the limitations period for Besing's claim expired.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT AND BANKRUPTCY COURTS' RULINGS THAT PETITIONERS WERE COLLATERALLY ESTOPPED FROM RELITIGATING THE APPLICABILITY OF 11 U.S.C. § 108(a) (APPLICABLE TO PETITIONERS' ISSUE NUMBER 1).

The Fifth Circuit, the District Court, and the Bankruptcy Court properly determined that Rogers was entitled to summary judgment as a matter of law because the competent summary judgment evidence demonstrated that Petitioners were collaterally estopped from relitigating issues identical to those which they had already litigated and lost in another court of competent jurisdiction. Pursuant to 28 U.S.C. § 1738, a state court judgment is entitled to the same preclusive effect in federal court as it is given by the courts of that state. E.g., Parsons

Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 525 (1986).

In Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986), the Texas Supreme Court brought Texas into conformity with federal law and held that a final judgment, even if an appeal is pending, is final for collateral estoppel purposes in another action except in the unusual circumstances where the appeal is really a trial de novo. The Court stated that "[d]espite the manifest risks of resting preclusion on a judgment that is being appealed, the alternative of retrying the common claims, defenses, or issues is even worse." Id. at 6 (quoting 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4433 at 313 (1981) and citing Prager v. El Paso Nat'l Bank, 417 F.2d 1111, 1112 (5th Cir. 1969)(the "fact that the judgment is now on appeal...has no effect on its absolute effect as a bar").

This case presents a classic example of collateral estoppel. Indeed, it is indisputable that the Texas court rendered summary judgment based upon the identical issue that Besing sought to present to the Bankruptcy Court: the availability of the tolling provision of Section 108(a) of the Code to extend the statute of limitations. Having litigated the identical issue between identical parties, the state court judgment, even though on appeal, collaterally estops the Bankruptcy Court from deciding the issue anew.

In the appeal to the Fifth Circuit, Besing for the first time raised the claim

that the elements of collateral estoppel are not met because the state court appeal is, in effect, a trial de novo. This argument was not raised or presented to either the Bankruptcy Court or the District Court and it is improper to raise it for the first time on appeal, as the Fifth Circuit noted.[1] Frank C. Bailey Enterprises, Inc. v. Cargill, Inc., 582 F.2d 333, 334 (5th Cir. 1978) (per curiam).

Even if Besing's de novo argument were considered, it must fail. Besing cites no authority for the naked assertion that the state court appeal is a trial de novo. This lack of authority is not surprising because the assertion is incorrect. The Texas Supreme Court has defined a trial de novo:

> A de novo trial means "anew; afresh; in the same manner; with the same effect; a second time." 18 C.J., 486; 25 C.J.S., De novo, p. 1011. Power to try a case de novo vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court. Zurich General, etc. Co. v. Rodgers, 128 Tex. 313, 97 S.W.2d 674, 675. From the above authorities we conclude that a de novo judicial trial means a full civil

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[1] Section "A" of Petitioners' Appendix at 4.

> trial on the facts as well as the law.

Lone Star Gas Co. v. State, 153 S.W.2d 681, 692 (Tex. 1941) (emphasis added).

As the Fifth Circuit held below, an appellate review of a summary judgment is not a trial de novo under Texas law because a Texas court of appeals is restricted to considering only the evidence and issues raised by the parties in the trial court. Medina v. El Paso Machine & Steel Works, Inc., 740 S.W.2d 99 (Tex. App.--El Paso 1987, no writ). In the trial court, the parties may present whatever arguments and evidence they wish and can supplement with leave of court. Tex. R. Civ. P. 166a(f) & (g).[2] On

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[2] The procedures governing summary judgments in Texas are set forth in Rule 166a, Tex. R. Civ. P. It provides, in relevant part:

> (f) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will

appeal, the parties can supplement neither their argument nor proof and are restricted to the matters raised in the court below. The court of appeals does not "try the case as if the suit had been filed originally in that court" and the appeal is therefore not a de novo trial. In general terms, an appeal from a normal trial court judgment is not considered a trial de novo. CLS Associates v. A.B., 762 S.W.2d 221, 223 (Tex. App. -- Dallas 1988, no writ).

Besing cites the case of Citibank N.A. v. Graphic Scanning, Corp., 618 F.2d 222 (2d Cir. 1980), as analogous to the case at bar. Citibank is distinguishable on at least two grounds: first, it is decided under the law of New York, not Texas, and there is no showing that the two state standards for collateral estoppel are similar; and second, the court is construing the Communications Act, not the

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not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Bankruptcy Code. The Communications Act vests exclusive jurisdiction of the claim brought by Citibank in the federal courts or before the Federal Communications Commission. In the case at bar there is no exclusive jurisdiction of this matter in the Bankruptcy Court, as the District Court correctly noted in its opinion affirming the Bankruptcy Court. (Section "C" of Petitioners' Appendix).

State courts routinely, and properly, interpret the Code and their decisions should be given preclusive effect under the doctrine of collateral estoppel. Brown v. Felsen, 442 U.S. 127 (1979); see also Nix v. Zervas, 92 B.R. 164 (Bankr. N.D. Tex. 1988). In Brown, this Court held that:

> If, in the course of adjudicating a state law question, a state court should determine factual issues using standards identical to those of § 17 [of the Bankruptcy Act], then collateral estoppel, in the absence of countervailing statutory policy, would bar re-litigation of those issues in the bankruptcy court.

Brown, 442 U.S. at 139 n.10.

The reasoning of Brown is squarely in line with the facts in this case. The state court had the identical parties before it and decided the identical issue -- whether 11 U.S.C. § 108(a) was available to Besing to toll the applicable statute of limitations. Collateral estoppel bars relitigation of that issue

in the Bankruptcy Court. The Bankruptcy Court therefore was correct in granting Rogers' motion for summary judgment based on collateral estoppel, and the District Court and the Fifth Circuit were correct in affirming it.

II. EVEN IF PETITIONERS WERE NOT COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE, THEIR CHALLENGE TO THE JUDGMENTS WOULD BE WITHOUT MERIT BECAUSE THE TOLLING PROVISION OF 11 U.S.C. § 108(a) WAS NOT AVAILABLE TO PETITIONERS AT THE TIME THEIR STATE COURT SUIT WAS FILED SINCE THEY WERE NO LONGER A DEBTOR-IN-POSSESSION AND THE CONFIRMED PLAN OF REORGANIZATION DID NOT RETAIN THE CAUSE OF ACTION WITHIN THE BANKRUPTCY ESTATE. (APPLICABLE TO PETITIONERS' ISSUE NO. 2)

Besing attempts to convince this Court that he is entitled to the limitations extension of Section 108(a) of the Code as a matter of law. Besing's argument regarding Section 108(a) lacks merit, however. The Section 108(a) issue was correctly decided in the forum originally chosen by Besing, the Texas state court. As a matter of law, Besing was not entitled to the benefits of Section 108(a) on his claim for relief because (1) he was not a debtor-in-possession when he brought suit, and (2) this claim was not reserved in his Plan of Reorganization.

Section 1141(b) of the Code revests all property of a bankruptcy estate in the

debtor/reorganized entity on the date of confirmation, terminating the bankruptcy estate:

> Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

Bankruptcy courts have consistently determined that confirmation of a plan of reorganization terminates debtor-in-possession status. See, e.g., In re Grinstead, 75 B.R. 2 (D. Minn. 1985); In re Alabama Fuel Sales Co., 45 B.R. 365 (N.D. Ala. 1985); U.S. v. Redmond, 36 B.R. 932 (D.Kan. 1984).

In Redmond, the government was trying to collect post-confirmation taxes against the bankruptcy estate, and argued the same point offered by Besing: that the debtors had continued to be debtors-in-possession because the estate was being administered and was not closed. The court rejected this argument, holding that:

> Unless a reorganization plan provides otherwise, confirmation vests all of the property of the estate in the debtor and releases it from all claims and interests of creditors....It is clear that upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the reorganized debtor, a new entity, and administration of the estate ceases.

Redmond, 36 B.R. at 934.

The mandate of Section 1141(b) and the cases following it are clear and preclude Besing's contention that he was a debtor-in-possession, unless their plan of reorganization explicitly vested the property in question (the cause of action against Rogers) in someone other than the debtor.

In Cunningham v. Healthco, 824 F.2d 1448 (5th Cir. 1978), the Fifth Circuit addressed this issue in the identical context of whether the statute of limitations was tolled. The court first stated:

> While a debtor-in-possession is entitled to §108's tolling period, however, a debtor is not....Thus, the statute of limitations issue is distilled to the question of whether Dental Leasing was still a debtor-in-possession on July 2, 1984. If it was, then it would have been entitled to rely on §108's tolling of the limitations period...On the other hand, if the reorganization period had ended and Dental Leasing had returned to "debtor" status, then §108's protection would not have been available to it...

Id.[3] The Court then found that the plan

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[3] Besing asserts in his Petition that there is no distinction between a debtor and debtor-in-possession. However, this key quotation from the Fifth Circuit opinion clearly demonstrates that when a right has been granted such as a limitations tolling

of reorganization explicitly "contained a reservation of rights by the creditors in the event that [the debtor] recovered, by way of lawsuit, any damages from [the defendant]." Id. at 1452. Because of this explicit reservation of the cause of action for the benefit of creditors, the Court held that the debtor was still a debtor-in-possession post-confirmation:

> If confirmation of the reorganization plan did not vest [the debtor] with title to its causes of action, then [the debtor] was still a "debtor-in-possession," and therefore was entitled to the tolling provision of § 108.

Id. at 1460.

In the case at bar, the opposite is true: the Plan vests the Debtors (Besing) with all of the property on the Effective Date of the Plan. Section 4.1 of the Plan provides:

> Besing shall be vested with all property of the Besing Estate on the Effective Date, free and clear of any and all liens, claims, and encumbrances, save and except the liens described in Paragraph 3.4, 3.4.1, and 3.5.1.

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provision only to the trustee/debtor-in-possession, there is a significant distinction after a plan has been confirmed and a debtor-in-possession is "returned to 'Debtor' status."

Section 4.1 also "vest(s) in Besing P.C. free of all liens, claims and encumbrances" assets used by it to practice law, except for subjection to the liens described in Paragraph 3.5 of the Plan. It is uncontroverted that in the Plan, Besing and Besing P.C. "shall be vested with all property of the ... Estate".[4] Moreover, the reservations for the estate described in paragraphs 3.4, 3.4.1, 3.5.1 and 4.1 did not apply to or reserve the cause of action against Rogers; instead the reservations only applied to and reserved an interest in Besing's homestead, his Austin condominium, an automobile and some IBM equipment. See §§ 3.4, 3.4.1 and 2.5 of the Plan. Consistent with the Plan, Besing and Besing P.C. later instituted suit in their own name and not as debtors-in-possession.

In In re Lawler, 106 B.R. 943, 961 (N.D. Tex. 1989), the court held that the tolling provisions of the Bankruptcy Code have no application to a debtor post-confirmation, but are only provided to

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[4] Moreover, the plan of reorganization itself negates any interpretation of continued debtor-in-possession status. Indeed, under Article IV, "Implementation of Plan," it provides that on its effective date (3 days after confirmation, or July 1, 1989) "... each Debtor shall turnover all funds in the debtor-in-possession accounts to Besing P.C. and Besing." § 4.1. Thereafter in the plan, there is no reference whatever to a debtor-in-possession.

toll limitations in actions brought by a trustee (or debtor-in-possession) for the benefit of an estate. The court stated:

> Depending on the circumstances of the particular case, §29(e)[5] may limit or extend the time for a trustee to bring an action, but where the trustee does not bring the action, §29(e) does not help or hinder a debtor prosecuting a case on his own behalf; it simply does not apply....This provision tolls limitation of a creditor's claims, not the claims of a debtor suing in his own behalf. The Congressional purpose in enacting the section bears out this interpretation.

Id. at 960-61. Accordingly, the court found that the tolling provision of the Bankruptcy Act did not help or hinder the debtor prosecuting a case on his own behalf; it simply did not apply. Id.

Besing's Brief argues that Rogers' position is based on the erroneous premise that confirmation of the Plan terminated the bankruptcy estate and the administration thereof. Besing's arguments misstate Rogers' position. Rogers' contention, based upon Section 541(a) of the Code and the cases that have considered it, is that Besing's claims against Rogers were the property of the bankruptcy estate prior to confirmation of the Plan. Upon confirmation, pursuant to § 1141(a), the claims revested in Besing because they were not explicitly retained by the bankruptcy

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[5] The same provision as §108.

estate in the Plan. Reservation of the claims in the Plan was the only method to preserve the benefits of § 108(a).

Besing further attempts to confuse the issue by stating that Rogers argues that actions of the nature brought by Besing in the state court must be brought before confirmation. Rogers takes no such position. Clearly this action could have been brought post-confirmation if Besing had done what was necessary to preserve the claim: reserve it in the Plan.

Just as misplaced as his reasoning is Besing's reliance on the cases cited to support his argument that he is entitled to the benefits of Section 108(a). Asserting that there is no distinction between a debtor and debtor-in-possession, Besing relies upon Seawinds Ltd. v. Nedlloyd Lines, B.V., 80 B.R. 181 (N.D. Cal. 1987); Flying "S" Land & Cattle Co. v. Beaumont (In re Flying "S" Land & Cattle Co. Inc.), 71 B.R. 183 (Bankr. D. Nev. 1987); In re Chapel Gate Apartments, Ltd., 64 B.R. 569 (Bankr. N.D. Tex. 1986); and In re Hargis, 73 B.R. 622 (Bankr. N.D. Tex. 1987). None of these cases addresses the issue presented in the case at bar and squarely addressed and answered by Cunningham: after the date of confirmation of the plan of reorganization which does not reserve the claim to the estate, Section 108 is not available to a mere debtor. Furthermore, all of the cases relied upon by Besing were decided prior to Cunningham, including Seawinds, Triangle Chemicals, Flying "S" Land & Cattle Co., Chapel Gate, and Hargis.

Besing also places great reliance on the case of Tennessee Wheel & Rubber Co. v. Captron Corp. Air Fleet (In re Tennessee Wheel & Rubber Co.), 64 B.R. 721 (Bankr. M.D. Tenn. 1986). His reliance is misplaced, however. Besing contends that Tennessee Wheel holds that the absence of a reservation of the claim in the plan is not fatal and then goes on to allege that the plan in Tennessee Wheel did not reserve the claims to the jurisdiction of the bankruptcy court. Nothing could be further from the truth. In fact, the plan in Tennessee Wheel specifically reserved the claims set forth in Tennessee Wheel. The opinion states:

> The Plan called for retention of jurisdiction by the bankruptcy court, inter alia, to recover assets pursuant to 11 U.S.C. §§ 547 and 548....
>
> These adversary proceedings are the avoidance actions described in the disclosure statement and plan and preserved for the debtor by the plan and confirmation order.

Id. at 723-24.

The issues that are addressed in Tennessee Wheel are Section 547 preferences and whether the debtor can maintain a preference action after confirmation. The defendants in Tennessee Wheel asserted that the avoidance actions passed out of the estate pursuant to the provisions of the confirmed plan. The court rejected the defendants' contention, finding:

> This ground is baseless because the reorganized debtor is statutory successor in interest to the pre-confirmation debtor and the plan of reorganization clearly contemplated retention of jurisdiction by the bankruptcy court to complete the prosecution of these avoidance actions.

Id. at 727 (emphasis added).

Even though Tennessee Wheel can be distinguished on the grounds that it was decided pre-Cunningham and was based upon a preference action, its logic is entirely consistent with Cunningham and with Rogers' position. If a claim is reserved in the plan of reorganization, then it can be asserted post-confirmation by the debtor who can enjoy the benefits of the rights granted to debtors-in-possession. Besing simply did not do what Tennessee Wheel and Cunningham say he must do: reserve the claim in the Plan.

In Natco Industries v. Federal Insurance Co., 69 B.R. 418 (S.D. N.Y. 1987), the court rejected an argument like Besing's:

> the purpose of the two year extension granted by section 108 is to preserve the interests of the debtor's estate ... Thus, these courts have held that debtors acting in their own interests, such as plaintiffs, cannot invoke section 108, or its predecessor, Section 29(e).

Id. at 419 (cites omitted). It further ruled:

> If debtors were permitted to invoke section 108, they would reap the benefit of a provision designed to preserve the estate as a whole pending bankruptcy proceedings. Furthermore, permitting post-confirmation debtors to use the section would not only discourage debtors from bringing timely actions, but could act as an inducement for debtors and debtors-in-possession to neglect claims during bankruptcy proceedings, and only later assert them following confirmation, thereby defeating the interest of creditors ... for these reasons, plaintiffs may not invoke section 108 and their action therefore is time-barred.

Id. at 420 (cites omitted).

The remaining cases cited in Besing's Brief are Jennings, Inc. v. Williams Carter Co. (In re J. E. Jennings, Inc.), 46 B.R. 167 (Bankr. E.D. Penn. 1985), and Korvettes, Inc. v. Sanyo Electric, Inc. (In re Korvettes, Inc.), 42 B.R. 217 (Bankr. S.D.N.Y. 1984). Each of these cases is distinguishable from the case at bar in that they involve claims of preferences of one type or another. Moreover, the Korvettes case was reversed. 67 B.R. 730 (S.D. N.Y. 1986).

Interestingly, one case not relied upon by Besing in the appeal to this Court or to the Fifth Circuit, but cited in his brief to the District Court, is Neptune World Wide Moving, Inc. v. Schneider

Moving & Storage Co. (In re Neptune World Wide Moving, Inc.), 111 B.R. 457 (Bankr. S.D.N.Y. 1990). Besing relied upon Neptune in the district court in support of his proposition that "§ 1141(b) authorized the debtor to proceed with recovery actions post confirmation, when the plan retains the court's jurisdiction .... over actions pending at the time of confirmation and actions commenced after the time of confirmation ...." (Tr. 61). It is amazing that Besing relied upon Neptune below and instructive that he later omitted it. The issue before the Court in Neptune was the bankruptcy court's post-confirmation jurisdiction over the debtor's claim. The court held that it had no jurisdiction over Neptune's claim because "[t]he property of the estate has reverted to Neptune pursuant to 11 U.S.C. § 1141(b), whereas the terms of its plan and confirmation order do not provide for retained jurisdiction to sustain post confirmation adversary proceedings." Id. at 464 (emphasis added).

Rogers urges that this Court accept the decisions of Neptune, as well as Cunningham and it progeny, and confirm that where a debtor fails to retain or reserve a claim in its plan of reorganization, that claim reverts to the debtor and the post confirmation debtor is not entitled to the benefits of Section 108(a).

CONCLUSION

The Bankruptcy Court properly granted Rogers' Motion for Summary Judgment on the basis of collateral estoppel and the District Court and the Fifth Circuit properly affirmed that judgment. The identical issues presented by Besing to the Bankruptcy Court had been presented to a collateral court of competent jurisdiction. The identical parties were involved and the collateral court ruled against Besing.

In the alternative, summary judgment for Rogers was appropriate on the merits because Section 108 of the Code only grants an extension of the statute of limitations to the representative of the bankruptcy estate, be it a trustee or debtor-in-possession, and not to the post-confirmation reorganized debtor. For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Neither the collateral estoppel nor the limitations argument presents an issue of such significance that it would merit this Court's consideration. Pursuant to Rule 10, Rules of the Supreme Court, the Petition should be denied. Moreover, costs should be taxed against Besing, and Respondents should have all other relief, at law or in equity, to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that three true and correct copies of the foregoing instrument were forwarded to Petitioners, RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C., by and through the attorney of record, Mr. Jamie Wall, 12222 Merit Drive, Suite 1430, Dallas, Texas 75251; Respondent, LYNCH, CHAPPELL, ALLDAY AND ALSUP, by and through the attorneys of record, Cowles & Thompson, Charles T. Frazier, Jr., 4000 NCNB Plaza, 901 Main Street, Dallas, Texas 75202; and Respondents, SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C. AND M.J. "IKE" VANDEN EYKEL, by and through the attorneys of record Brill, Sinex & Stephenson, Mr. Joe A. Byrom, 3500 Bank One Center, 1717 Main Street, Dallas, Texas 75201 via first class mail on July 17, 1992.

Schuyler B. Marshall